

PART 5350--EXTRAORDINARY CONTRACTUAL ACTIONS

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SUBPART 5350.1--GENERAL

5350.104 Reports. As counsel for the Air Force Contract Adjustment Board, SAF/GCQ submits the report to Congress through the Office of the Secretary of Defense.

5350.105 Records. Activities identified in 5350.201 shall prepare preliminary and final records required by DFA R S 250.303 and 250.305-70 and forward these records (along with other required documents, such as Memoranda of Decision pursuant to FAR 50.403-2) to SAF/GCQ, through SAF/AQCX, as follows:

(1) Activities without delegated authority shall send the records to AFMC/PKM in quadruplicate;

(2) AFMC shall send its records and the records of activities it is responsible for to SAF/AQCX on a monthly basis; and

(3) Activities, other than AFMC, having delegated authority under 5350.201 shall send the records directly to SAF/AQCX on a monthly basis.

SUBPART 5350.2--DELEGATION OF AND LIMITATIONS ON EXERCISE OF AUTHORITY**5350.201 Delegation of authority.**

(a) The Deputy Assistant Secretary (Contracting), SAF/AQC, has been delegated authority to--

(1) Deny any request for contractual adjustment under FAR Subpart 50.3.

(2) Approve, authorize, and direct appropriate action, and to make all determinations and findings which are necessary or appropriate, in the examples of mistake and informal commitment described in FAR 50.302-2 and 50.302-3, including, where necessary thereto, authority to modify or release unaccrued obligations of any sort and to extend delivery and performance dates. This authority is limited to actions which do not obligate the United States to \$50,000 or more.

(3) Recommend to the Air Force Contract Adjustment Board for determination cases for adjustment where the Director does not have authority to approve and any

doubtful or unusual cases.

(b) The authority in (a) above has been redelegated--

(1) To the Commander, Air Force Materiel Command. This authority may be redelegated to the Deputy Chief of Staff and the Assistant DCS, Contracting, with authority to redelegate to the commanders of the air logistics and product centers in cases when the amount requested would not obligate the government in excess of \$5,000.

(2) To the commanders of contracting activities in DFARS Subpart 202.1 (other than AFMC) in cases when the amount requested would not obligate the government in excess of \$5,000. This authority may be redelegated, in writing, to the respective HCA, or designee.

(3) For other commands, FOAs, and DRUs, to the Commander, Air Force Materiel Command, with authority to redelegate to the Deputy Chief of Staff and the Assistant DCS, Contracting, Air Force Materiel Command.

5350.202 Contract adjustments boards. The Air Force Contract Adjustment Board shall serve as the exclusive point of contact with other military departments, or other departments or agencies of the government, relative to the exercise of authority under Public Law 85-804. Accordingly, any request for information or action directed to another military department or another department or agency of the government relative to the exercise of authority under Public Law 85-804 shall be sent to the Air Force Contract Adjustment Board, through SAF/AQC, for appropriate action. Similarly, responses to requests from another military department for a determination of essentiality pursuant to FAR 50.305 shall be prepared by SAF/AQC and signed by the Chairman of the Air Force Contract Adjustment Board. A recommendation that a contractor be considered essential must be supported by a determination as required in 5350.305-90(d)(3). In addition to the requirements of 5350.305-90(d)(3), the determination should include a statement of the amount, if any, the Air Force would be willing to contribute to relief granted the contractor.

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5350.203 Limitations on exercise of authority.

(e) The exercise of authority below the Secretarial level pursuant to 5350.201 shall not release a contractor from performance, when--

- (1) The obligation would exceed \$5,000 or
- (2) Reacquisition is contemplated, except when the approving authority finds that the cost to the government is not expected to exceed \$5,000.

SUBPART 5350.3--CONTRACT ADJUSTMENTS

5350.305 Processing cases.

5350.305-90 Investigations.

(a) General. A contracting office which receives a request for contractual adjustment under P.L. 85-804 is responsible for the investigation of the facts and issues relating to the request. Within 10 calendar days after receipt of a contractor's request for relief, the contracting office shall send the contractor a letter of acknowledgement, which--

- (1) Identifies any additional information that is needed before the contracting office will begin processing the request and advises the contractor that the additional information must be submitted within 30 calendar days.
- (2) The contractor shall be advised that failure to submit the information within the allotted time may result in denial of the request.

(b) Forwarding to approving authority.

(1) The contracting office shall assemble and forward the preliminary file described in 5350.305-90(d) to the approving authority identified in 5350.201 within 10 calendar days after receipt of a request complying with FAR 50.303. Upon receipt of the preliminary file, a designated reviewing office of the approving authority shall review the claim and initiate discussions with the contracting office. The discussions shall be used to coordinate the scope of the investigation and develop a mutual understanding of what is required to expeditiously render a decision on the request for relief. The contracting office shall submit the completed file described in 5350.305-90(e) within 90 calendar days from receipt of the request, accompanied by any additional facts and evidence necessary to act upon the contractor's request.

(2) Within 30 days after receipt of the completed file, which will include the contracting officer's recommenda-

tion and a proposed Memorandum of Decision, the approving authority, if authorized to do so, shall sign a Memorandum of Decision approving or denying, in whole or in part, the contractor's request for relief.

(3) When the approving authority is not authorized to grant the recommended relief, the approving authority shall forward the completed file and recommendation to the approving authority at HQ AFMC (if not already at that level) for review and disposition. If the approving authority at HQ AFMC is not authorized to grant the recommended relief, that authority shall forward the completed file and recommendation to SAF/AQCX for further processing to SAF/AQ and the Air Force Contract Adjustment Board.

(c) Preliminary file. The preliminary file shall consist of the following:

- (1) Purchase request (PR) and other documents reflecting previous prices paid;
- (2) Solicitation, including amendments;
- (3) Findings and determination rendered;
- (4) Abstract of bids or proposals;
- (5) Contract awarded and all change orders or supplemental agreements;
- (6) Contractor's request for relief;
- (7) Contracting activity's letter acknowledging contractor's request for relief or requesting additional information; and
- (8) Any additional documentation pertinent to the request for relief.

(d) Completed file. In addition to a current version of the documents in the preliminary file, the completed file should also include:

(1) The contracting officer's recommendation and comments should state whether, in the contracting officer's opinion, the contractor's request should be approved in whole or in part, or denied. If the contracting officer recommends approval involving a change in the contract price or other payment to the contractor, the recommendation should specify the dollar amount which the contracting officer considers fair and reasonable and include supporting evidence. The contracting officer's comments will include--

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(i) A statement of facts based on the contracting officer's knowledge of the circumstances;

(ii) A statement as to whether the contractor has submitted the information required by FAR 50.303, or requested by the contracting officer pursuant to FAR 50.304, and commenting on the accuracy and completeness of information so received;

(iii) A statement, when approval is recommended, of why other legal authority is deemed to be lacking or inadequate;

(iv) A statement of the extent of performance and whether performance to date has been satisfactory;

(v) Whether the contractor is a small or large business, if not stated in the contract;

(vi) When the contractor has alleged a mistake, a statement of when the alleged mistake was first brought to the contracting officer's attention; whether the contracting officer believes that a mistake actually occurred, and, if so, how it occurred for example, through clerical or mathematical error in the contractor's offer, through an error in the bid, etc.; and whether, in sealed bid contracts, the contracting officer requested verification of the bids;

(vii) When the contractor has alleged an informal commitment, a statement of the action taken by the government; whether the government actually received supplies or services as a result of that action; and evidence to support or preclude a finding that the informal commitment was made at a time when it was impracticable to use normal contracting procedures; and

(viii) Such additional evidence as the contracting officer considers pertinent.

(2) Audit report, if such a report is required;

(3) In cases in which relief is to be granted in the form of an amendment without consideration based on a contractor being essential to the national defense, a determination attesting to the contractor's essentiality. The determination shall include a detailed statement of the contractor's financial condition and projection of financial assistance needed for continued viability, the availability of alternate sources, mission impact if the contractor cannot continue to perform on current Air Force contracts and the estimated cost and impact of a delay to develop another source. Prior to submission of the request to the

Air Force Contract Adjustment Board, the Assistant Secretary of the Air Force (Acquisition) (ASAF(A)) shall sign a determination of contractor essentiality. The determination shall be coordinated with any other offices with program responsibility for the contract item(s) on which the determination is based.

(4) Additional facts and evidence requested pursuant to FAR 50.304 and not previously submitted.

(e) Original documents. Files submitted by the contracting activity should contain as many original documents as possible. However, since the file submitted will remain with the approval authority following a final decision, official documents to be included in the contract file should be retained by the contracting activity.

5350.306 Disposition. For all cases processed in accordance with 5350.305-90 that are submitted to or through HQ AFMC for final action, submit-

(1) Six copies of the memorandum of decision; and

(2) Two copies of the contractual document implementing the decision.

SUBPART 5350.4--RESIDUAL POWERS

5350.401 Standards for use.**5350.401-90 Indemnification under Public Law 85-804.**

(a) Only the Secretary can grant indemnification under P.L. 85-804 and E.O. 10789 as amended.

(b) The Air Force will consider indemnifying contractors under this authority when the risk arises out of an instrumentality or activity which is unusually hazardous or nuclear in nature with risk of loss so potentially great that the contractor's financial and productive capabilities would be severely impaired or disrupted. The indemnified risk shall be precisely defined and directly related to the intrinsically hazardous or nuclear nature of the instrumentality or activity, or to the potentially catastrophic loss. Indemnification

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may extend beyond the period of contract performance only when the potential for devastating financial loss may result from normal use of the product. Indemnification shall not be provided for other forms of "product liability" beyond that resulting from the unusually hazardous or nuclear risks initially defined in the contract.

(c) In addition to (b) above, the Air Force will consider indemnifying contractors against unusually hazardous or nuclear risks with a potential for catastrophic loss for the purpose of furthering programmatic aims in the interest of the national defense. Providing indemnification to further programmatic aims will be considered for only exceptional compelling circumstances. Programmatic aims include, but are not limited to, assuring or obtaining competition, avoiding prohibitive insurance costs or where obtaining insurance is precluded by the release of classified information. Reducing or eliminating the insurance costs charged directly to a program does not in itself establish that insurance costs are prohibitive. Any request for indemnification for programmatic aims must clearly identify the programmatic purposes to be served and how indemnification will serve those purposes.

5350.403 Special procedures for unusually hazardous or nuclear risks.

5350.403-1 Indemnification requests.

(a) The risks for which indemnification is sought must be precisely defined and directly related to the intrinsically hazardous or nuclear nature of the instrumentality or activity or to the potentially catastrophic loss. Requests shall focus on only those risks for which insurance is not reasonably available at a reasonable cost or for which indemnification is necessary to further programmatic purposes.

(b) The risks must be related to a specific time-frame for which indemnification is required and must indicate whether the time-frame extends beyond contract performance.

(c) The purposes to be served by indemnifications must be clearly identified and the needs for indemnification substantiated so that the scope and nature of the request may be fully evaluated.

5350.403-2 Action on indemnification requests.

(a)(1) Prior to recommending indemnification, contracting officers shall ascertain that the contractor maintains financial protection in the form of liability insurance in amounts considered to be prudent in the ordinary course

of business within the industry. In addition, the contractor shall submit evidence, such as a certificate of insurance or other customary proof of insurance, that such insurance is either in force or is available and will be in force during the indemnified period. A copy of the latest report on the contractor's insurance issued by the cognizant Government reviewing activity (i.e., DPRO, DCMAS, etc.) shall be submitted with the request for indemnification. The fact that insurance will be a direct cost to the program will not in itself be cause for a determination that financial protection is not reasonably available, although the cost of such insurance over and above the contractor's usual and customary cost for insurance will be considered.

(2) Notwithstanding (1) above, there may be cases in which the Air Force will determine to indemnify the contractor only against losses in excess of an identified dollar amount.

(3) Whether certain risks are unusually hazardous or nuclear in nature requires a reasoned judgment based on the facts and circumstances of each case. Considerations which will assist in making that determination include--

(i) Understanding the nature of the risk for which indemnification is being requested and its relation to the product or activity;

(ii) Assuring there is a clear, precise definition of the unusually hazardous or nuclear risk;

(iii) Ascertaining the time-frame for indemnification;

(iv) Identifying the programmatic objectives for providing the indemnification requested such as assuring competition, avoiding prohibitive insurance costs, assuring contractor performance of essential services, or assuring protection of contractors from catastrophic loss where, for security reasons, adequate information cannot be disclosed to insuring activities to establish insurance coverage; and

(v) Determining that the indemnification provided serves the identified programmatic purposes.

(4) Contracting officers shall also assure that the contractor has an adequate, existing, and on-going industrial safety program prior to recommending indemnification. If indemnification is to extend into the period of use of the supplies or equipment, the contracting officer shall assure that the contractor has and maintains adequate system design, production engineering, and quality control

procedures and systems. A copy of the current safety report issued by the cognizant Government reviewing activity (i.e., DPRO, DCMA, etc.) shall be submitted with the request for indemnification.

(5) Requests that are based on programmatic objectives shall be submitted over the signature of the Commander or not lower than the Vice Commander of the MAJCOM.

(6) Requests for indemnification authority shall be submitted through channels to SAF/AQC.

(b) Upon receipt of authority to indemnify the agreed upon risk, and prior to inclusion of the appropriate indemnification clause in the contract, the contractor shall provide the PCO with a copy of the certificate of insurance, the policy or other binder evidencing that the insurance coverage required is current and in effect.

5350.403-90 Analysis for indemnification requests. The following information and analysis shall be included to supplement the information required by FAR 50.403-2:

(a) A clear, precise definition of the risk in establishing the relationship of the system/equipment to the intrinsically hazardous or nuclear nature of the instrumentality or activity;

(b) For risks arising from instrumentalities or activities which are unusually hazardous or nuclear in nature, elaborate on the "unusually" hazardous versus hazardous nature. Many private sector activities are hazardous and a clear distinction must be shown;

(c) Dates or measurable activities (e.g., delivery of the last unit) when indemnification will start and stop;

(d) Define the programmatic objectives that cannot be otherwise accomplished and identify the programmatic consequences if indemnification is not granted;

(e) Discuss any deductibles and apportionment of loss provisions in applicable insurance coverages;

(f) When indemnification is to extend beyond acceptance and into the period of use, requests shall include a determination that the contractor has adequate system design, production engineering, and quality control procedures and systems; and

(g) A determination by the Commander of the buying activity that indemnification is required to satisfy the programmatic objectives.